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On June 29, 2005, Senator Patrick Leahy and 31 cosponsors introduced S.J.Res. 20; on the same day, a similar resolution (H.J.Res. 56) was introduced in the House by Representative Martin Meehan. If enacted into law, these resolutions would disapprove, under the Congressional Review Act, a rule promulgated by the Environmental Protection Agency on March 29, 2005, in which EPA determined not to regulate hazardous air pollutants from coal- and oil-fired electric utility units under Section 112 of the Clean Air Act. Introduction of the Senate resolution set in motion procedures under which the Senate may vote on whether to overturn the rule if at least 30 Senators submit a petition to discharge the resolution from the committee to which it is referred. Thirty-two Senators did so on July 18. By that point, no action had yet occurred on the House measure.

This report discusses the EPA rule that is the subject of the disapproval resolution, describes the procedures under which the resolution can be considered, and provides additional references and background information that may be of interest in light of the potential debate. The report will be updated if congressional action warrants.

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Introduction

On March 29, 2005, the Environmental Protection Agency (EPA) promulgated a final rule[1] reversing an earlier EPA determination that mercury and other hazardous air pollutants emitted by electric power plants should be regulated under Section 112 of the Clean Air Act.[2] By reversing its earlier determination, EPA effectively eliminated a requirement that utilities meet "Maximum Achievable Control Technology" (MACT) standards at each individual coal- and oil-fired plant.

Had MACT standards been promulgated, existing facilities would have had three years to meet them, with the possibility of one-year extensions of the deadline if it were necessary for the installation of controls. Thus, EPA's March 29 rule eliminated a requirement that individual utility plants meet MACT requirements by March 2008 or 2009.

In eliminating the MACT requirement, the March 29 rule paved the way for a separate May 18, 2005, rule in which EPA promulgated a cap-and-trade program for power plant mercury emissions. The cap-and-trade rule would be implemented in two phases, and would allow utilities to bank (for later use) or trade allowances earned by reducing emissions earlier, or more, than required. In general, according to EPA's analysis, power plants would not install control equipment specifically designed to reduce mercury emissions until the 2020s under the cap-and-trade rule. For a full discussion of the cap-and-trade rule and EPA's rationale in promulgating it, see CRS Report RL32868, *Mercury Emissions from Electric Power Plants: An Analysis of EPA's Cap-and-Trade Regulations*.

There has been much discussion among interested parties regarding what level of control would have been required by the MACT provision. In Section 112(d), the statute requires that MACT standards for existing facilities "shall not be less stringent, and may be more stringent than ... the average emission limitations achieved by the best performing 12 percent of the existing sources." On January 30, 2004, EPA had proposed MACT standards for five categories of electric generating units that would have required mercury emission reductions of about 30%, on average. Many maintained that this MACT proposal did not meet the statutory minimum requirements. (For a discussion of the MACT proposal, see CRS Report RL32744, *Mercury Emissions from Electric Generating Units: A Review of EPA Analysis and MACT Determination*.)

If the March 29 rule were to be ultimately disapproved by Congress, EPA would be forced to issue MACT standards for coal- and oil-fired electric power plants. How quickly the agency would do so is uncertain. Having proposed MACT standards and taken public comment on them in 2004, the agency could proceed to promulgation without significant delay. But the dispute over the stringency of such standards would likely continue even if promulgation came swiftly, as stakeholders debate whether EPA's choice of MACT meets the "best performing 12 percent" minimum established by the statute.

[1] "Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-fired Electric Utility Steam Generating Units from the Section 112(c) List," 70 *Federal Register* 15994, March 29, 2005.

[2] Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 *Federal Register* 79825, December 20, 2000.

Effect of the Congressional Review Act[3]

The Congressional Review Act, enacted in 1996,[4] establishes special congressional procedures for disapproving a broad range of regulatory rules issued by federal agencies. Before any rule covered by the act can take effect, the federal agency that promulgates the rule must submit it to Congress. If Congress passes a joint resolution disapproving the rule, it would become law unless Congress sustained a presidential veto. If the resolution became law, the rule could not take effect or continue in effect, and the agency would be barred from reissuing it or any substantially similar rule, except under authority of a subsequently enacted law.[5] Pending action on a disapproval resolution, the rule may go into effect, unless it is a "major rule," in which case a delay period of 60 calendar days applies, unless waived by the President or issuing agency. The March 29 mercury rule has not been categorized as a "major rule," and thus is currently in effect, pending any action on a disapproval resolution.

The Congressional Review Act provides that a disapproval resolution may be introduced in each chamber within 60 days (excluding recesses of either house) after the receipt by Congress of the rule to be disapproved. The rule in question was received by the Senate on April 4, and by the House on April 21. Both S.J.Res. 20 and H.J.Res. 56 were submitted within the requisite 60-day period, which began on the latter date. Pursuant to the act, a disapproval resolution is referred in each chamber to the appropriate committee of jurisdiction. S.J.Res. 20 was referred to the Senate Committee on Environment and Public Works, and H.J.Res. 56 to the House Committee on Energy and Commerce.

The act provides an expedited procedure for initial floor consideration of a disapproval resolution only in the Senate. The House would consider a disapproval resolution under its general procedures, very likely as prescribed by a special rule reported from the Committee on Rules. In the Senate, beginning 20 calendar days after Congress receives the rule, if the committee to which a disapproval resolution has been referred has not reported it, the panel may be discharged if 30 Senators submit a petition for the purpose, and the resolution is then placed on the Calendar. On July 18, 2005, 32 Senators submitted a petition discharging the Environment and Public Works Committee from further consideration of the mercury resolution.

Taking Up a Disapproval Resolution in the Senate

Pursuant to the Congressional Review Act, the expedited procedure for Senate consideration of a disapproval resolution may be used at any time during the 60 days of Senate session that begin when the rule in question has been published in the *Federal Register* and received by both houses of Congress. For the mercury rule, this period for expedited Senate consideration appears likely to end on approximately September 13.

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[3] The next four sections of this report, discussing the effect of the Congressional Review Act, the procedures under which a disapproval resolution is taken up in the Senate, floor consideration in the Senate, and final congressional action, are adapted from CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*. Additional discussion of the form of disapproval resolutions, statutory time frames, other elements of the expedited procedures, and limitations of the expedited procedures can be found in that report.

[4] Subtitle E ("Congressional Review") of the Small Business Regulatory Enforcement Fairness Act of 1996, Title II of the Contract with America Advancement Act of 1996, P.L. 104-121, 110 Stat. 847 at 868-874, codified at Title 5 U.S.C. Sections 801-808. The congressional disapproval procedure is contained in Section 802.

[5] 5 U.S.C. Section 801(b).

Under this expedited procedure, once a disapproval resolution is on the Calendar in the Senate, a motion to proceed to consider it is in order.[6] This provision of the expedited procedure has the effect of waiving any layover requirements that would normally apply under the general rules of the Senate. The motion to consider is normally reserved to the Majority Leader, to whom the Senate, in practice, accords responsibility for arranging the floor agenda. Nevertheless, by including the motion explicitly in the expedited procedure, the act emphasizes that the Senate, in principle, has means of calling up the disapproval resolution, no matter what position the committee or leadership take on it. As with any other measure, of course, a disapproval resolution could also be brought up for consideration by unanimous consent, which would usually be obtained by the Majority Leader.

Several provisions of the expedited procedure protect against various potential obstacles to the Senate's ability to take up a disapproval resolution. Some of these help ensure that the Senate will be able to vote on a motion to proceed, once the motion is pending, by prohibiting motions to postpone its consideration, to amend it, or to proceed to consider some other business. Any points of order that might be raised against the measure or its consideration are waived as well. Finally, if the motion to proceed is adopted, a motion to reconsider that action is prohibited.

The Congressional Review Act does not explicitly make the disapproval resolution privileged for consideration. Senate precedents, however, indicate that if a statute establishes a time limit for the consideration of a specified measure, the provision has the effect of rendering the measure privileged. In the Senate, a motion to proceed to consider a privileged measure is not debatable. Consistent with this principle, the Senate has treated a motion to consider a disapproval resolution under the Congressional Review Act as not debatable, so that this motion cannot be filibustered through extended debate.[7]

Floor Consideration in the Senate

After the Senate takes up the disapproval resolution itself, the expedited procedure of the Congressional Review Act protects the ability of the body to continue and complete that consideration. First, once the motion to proceed is adopted, the resolution becomes "the unfinished business of the Senate until disposed of," and motions to proceed to consider other business, or to postpone consideration of the resolution, are prohibited.[8] Under these conditions other business may interrupt consideration of the disapproval resolution only if the Senate gives unanimous consent. If the Senate does turn to other business by unanimous consent, the disapproval resolution automatically recurs as pending after the interruption, unless the unanimous consent agreement provides that the other business displace the disapproval resolution as the unfinished business.

Second, it is not in order in the Senate, under the act, to move to amend or recommit the disapproval resolution. The Senate sometimes uses the motion to recommit in such a way as to effect an amendment. These provisions therefore help to ensure that the Senate disapproval resolution will remain identical, at least in substantive effect, to the House joint resolution disapproving the same rule. Potentially, however, this identity could be destroyed by House

[6] 5 U.S.C. Section 802(d)(1).

[7] "Motion to Proceed — S.J.Res. 6," proceedings in the Senate, *Congressional Record*, daily edition, Vol. 147, March 6, 2001, p. S1831.

[8] 5 U.S.C. Section 802(d)(2).

action on H.J.Res. 56, inasmuch as the act does not prohibit amendment of a disapproval resolution during committee or floor consideration in the House.

Third, Senate debate on a disapproval resolution is limited to 10 hours, equally divided between supporters and opponents, so that no filibuster is possible on the resolution itself. In addition, the act provides that a motion may be offered to limit the time for debate further, and this motion itself is not debatable. Any appeal from a ruling of the chair during consideration of a disapproval resolution (or motion to proceed to its consideration) also is to be decided without debate.[9]

Finally, the act provides that at the conclusion of debate, the Senate automatically proceeds to vote on the resolution. No intervening action is permitted, except that one quorum call may take place if any Senator so requests.[10] If the act did not prohibit other intervening actions at this point, those actions might be used for dilatory purposes.

Final Congressional Action

No measure can be presented to the President for action until both houses have agreed to it in identical form. If each house initially passes its own disapproval resolution, even if the texts are identical, neither can yet go to the President, for neither has been agreed to by both chambers. To prevent this situation, the Congressional Review Act provides that when either house adopts a disapproval resolution and sends it to the other, the receiving house must hold it at the desk, rather than refer it to committee. This action retains the received resolution in a status in which it is available for floor action. The act then provides that, after the receiving house later considers a disapproval resolution of its own, it shall vote not on its own measure, but instead on the resolution already received from the other house. In this way both houses take final action on the same measure; if both adopt it, the requirements for presentation to the President are satisfied.[11]

In one respect, these proceedings reflect normal practice in both houses for carrying out a "hookup" between corresponding House and Senate measures. Normally, each house initially considers its own measure, but the house that acts second then takes up and passes the corresponding measure already received from the other. If the two measures are not identical, the house acting second normally amends the measure received from the other with the text of its own measure. This action enables the two houses to proceed, by conference or otherwise, to resolve the differences between these two versions of the same measure. The expedited procedure of the Congressional Review Act avoids this necessity by requiring one chamber to vote directly on the measure received from the other, without amending it.

It appears that these provisions of the act would apply even if the texts of the two measures are not identical, as long as the chair could determine that both would disapprove the same rule, and that they therefore corresponded to each other for purposes of the statutory procedure. In this way, even if the two houses initially consider disapproval resolutions with differing texts, both will ultimately vote on the same text; namely, that approved by whichever house acted first. This mechanism helps to prevent any delay that might arise if the House and Senate could not agree on a final text through conference or amendments between the houses.

The automatic hookup mechanism provided for by the act presumes that each house will initially act on its own disapproval resolution. In 2001, however, when Congress disapproved the rule on

[9] 5 U.S.C. Section 802(d)(4).

[10] 5 U.S.C. Section 802(d)(3).

[11] 5 U.S.C. Section 802(f).

ergonomics submitted by the Clinton administration in 2000, the House never took up the House measure for floor consideration, but instead considered and acted on only the companion measure already received from the Senate.[12] No doubt seems to have been raised that this form of action failed to satisfy the requirements of the act for disapproving a rule.

The Congressional Review Act sets no deadline for final congressional action on a disapproval resolution. Nor does it establish any expedited procedure for further congressional action on a disapproval resolution if the President vetoes it. Congress could, however, attempt to override a veto using its normal procedures for considering vetoed bills.

Effect of Congressional Review on Other Avenues of Appeal

In addition to the resolutions of disapproval, opponents of the March 29 rule are pursuing several other approaches to overturning it. The day the rule appeared in the *Federal Register*, March 29, nine states filed suit to overturn it in the U.S. Court of Appeals for the D.C. Circuit.[13] On May 31, 14 states and five environmental groups petitioned EPA to reconsider the rule and to stay its effect pending the reconsideration. On July 8, 12 environmental groups asked the D.C. Circuit for a stay of the rule.[14]

In responding to these or other potential motions, the courts and EPA are prohibited from basing their decisions on whether Congress takes action on a resolution of disapproval. Under Section 801(g) of the Congressional Review Act, "If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval."

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[12] "GOP Rejects Ergonomics Rules," *CQ 2001 Almanac Plus* (Washington: CQ Press, 2001), p. 13-3.

[13] New Jersey v. EPA, No. 05-1097 (D.C. Cir.).

[14] Environmental Defense v. EPA, No. 05-1159 (D.C. Cir.).

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